PEMBINAAN CERAH SDN. BHD. & 3 ORS.

v.

BUILDCON SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[CIVIL APPEAL NO. R2-12-104-92]
18 AUGUST 1994

CONTRACT: Plaintiff supplying concrete to 1st defendant - 1st defendant running into financial difficulties - 4th defendant providing indemnity for continued supply of concrete - Invoices presented for payment - Claim on indemnity - Whether 4th defendant liable to pay for concrete supplied before indemnity executed - Whether 4th defendant's obligation to pay abrogated by clause 2.1 of indemnity.

PRACTICE & PROCEDURE: Appeal - 4th defendant providing indemnity to plaintiff for continued supply of concrete to 1st defendant - Whether 4th defendant liable to pay for concrete supplied before indemnity executed - Whether 4th defendant's obligation to pay abrogated by clause 2.1 of indemnity.

This was an appeal against an order allowing the plaintiff's claim on an indemnity executed by the 4th defendant.

The 1st defendant was the 4th defendant's contractor who was to construct 90 units of double storey houses in Taman Menjelera, Bukit Maluri. The plaintiff supplied concrete to the 1st defendant. Upon the 1st defendant encountering financial difficulties, the 4th defendant provided an indemnity to secure payment and the continued supply of concrete. The plaintiff presented 29 invoices for payment but the defendants failed to settle the same whereupon the plaintiff filed suit and obtained judgment against the 4th defendant.

The 4th defendant questioned their liability to pay for concrete supplied prior to the execution of the indemnity and contended that their liability to pay had not arisen by virtue of clause 2.1 of the indemnity which required the 1st defendant to stamp or acknowledge all delivery orders and invoices and present them to the 4th defendant which the 1st defendant had failed to do.

Held:

[1] Bearing in mind the nature of the liability by which the 4th defendant had readily agreed to be bound, it was the Court's opinion that when the 4th defendant agreed to indemnify the plaintiff for all monies incurred by the 1st defendant for the supply of concrete at the 1st defendant's site, the indemnity also extended to the 4th defendant indemnifying the plaintiff for all monies already incurred by the 1st defendant in respect of the concrete already supplied to them before the execution of the indemnity.

[2] The plaintiff had already done their part by delivering the concrete to the 1st defendant's site and presenting the 1st defendant with the necessary invoices and delivery orders. The fact that the 1st defendant had failed to stamp them and present them to the 4th defendant was no fault of the plaintiff but was strictly the 1st defendant's own omission. Clause 2.1 merely provided when payment was to be effected. It had nothing to do with the 4th defendant's obligation to pay, the right of which was in no way

abrogated by clause 2.1. The 4th defendant could not raise this as an excuse to escape liability especially when the 1st defendant was the 4th defendant's own contractor. There had been no miscarriage of justice when judgment was entered for the plaintiff in the Sessions Court.

[Appeal dismissed with costs].

For the appellant - Haris bin Mohd. Ibrahim; M/s. Adam & Co.
For the respondent - Bryan Shankar; M/s. Khalid, Chung & Shankar

JUDGMENT

Siti Norma bte Yaakob J:

The appellant in these proceedings are the 4th defendant in the original suit and they are sued on an indemnity dated 15 January 1988, wherein they agreed to indemnify the respondent (the plaintiff in the original suit) for all sums due in respect of concrete supplied by the plaintiff to the 1st defendant. The 1st defendant is the 4th defendant's contractor and the contract to supply concrete was initially between the plaintiff and the 1st defendant. However, when the 1st defendant ran into financial difficulties, the 4th defendant came into the picture and secured payment by providing the indemnity, thus enabling the plaintiff to continue supplying concrete to the 1st defendant. The 1st defendant has since been wound up.

The plaintiff's claim is founded on 29 invoices in respect of the concrete supplied to the 1st defendant between 3 December 1987, and 8 March 1988.

In their appeal against an order allowing the plaintiff's claim with costs, the following issues were raised by the 4th defendant:

1. Whilst conceding that they had executed the indemnity, nonetheless they question their liability to pay in respect of the concrete that was supplied to the 1st defendant before the indemnity was executed on 22 January 1988.
2. The liability to pay has not arisen by virtue of clause 2.1 of the indemnity.

As I had indicated earlier, the 4th defendant only came in when they found that the plaintiff was not about to supply further concrete as the 1st defendant was finding it difficult to pay for the concrete already supplied. As the 1st defendant was their contractor, the 4th defendant had executed the indemnity and it is highly inconceivable that the plaintiff would agree to make further supplies to the 1st defendant if the 4th defendant were only agreeable to meet the future liability of the 1st defendant but not the 1st defendant's current liability. It is true that the indemnity is silent on this but considering that the indemnity was prepared by the parties themselves and without the benefit of legal advice, it is no wonder that such an omission had occurred. However, bearing in mind the nature of the liability which the 4th defendant had readily agreed to be bound, it is my considered opinion that when the 4th defendant agreed to indemnify the plaintiff for all monies incurred by the 1st defendant in the supply of concrete at the 1st defendant's site, the indemnity also extended to the 4th defendant indemnifying the plaintiff for all monies already incurred by the 1st defendant in respect of concrete already supplied to them before the execution of the indemnity.

It is also the 4th defendant's intention that their obligation to pay is governed by clause 2.1 of the indemnity which provides that they have to pay the plaintiff directly for all concrete supplied to the 1st defendant upon presentation by the delivery orders and

invoices issued by the plaintiff and which had been signed and acknowledged by the 1st defendant. In this case, the plaintiff had issued 29 invoices and delivery orders in the name of the 1st defendant but the 1st defendant had not only failed to stamp or acknowledge such documents but had also failed to present them to the 4th defendant. It is because of this omission to stamp, acknowledge and present that the 4th defendant now maintain that their obligation to pay had not arisen.

It is not disputed that the concrete was delivered to the 1st defendant and it is also not disputed that the omission to stamp, acknowledge and present was made by the 1st defendant and not the plaintiff. The plaintiff had already done their part by delivering the concrete to the 1st defendant's site, and had presented the 1st defendant with the necessary invoices and delivery orders. The fact that the 1st defendant had failed to stamp them and present them to the 4th defendant was no fault of the plaintiff but is strictly the 1st defendant's own omission.

Reading clause 2.1, I consider that it merely provides when payment is to be effected. It has nothing to do with the 4th defendant's obligation to pay, the right of which is in no way abrogated by clause 2.1. The purpose of clause 2.1 is merely to enable legitimate claims to be processed by the presentation by the 1st defendant of all stamped and signed delivery orders and invoices issued by the plaintiff. The obligation to have such documents stamped and signed falls on the 1st defendant and since this has not been done, the 4th defendant cannot raise this as an excuse to escape liability especially when the 1st defendant was the 4th defendant's own contractor who needed the concrete to construct 90 units of double storey houses in Taman Menjelera, Bukit Maluri, Kepong, for the 4th defendant.

On the facts of this case, I do not consider that there has been any miscarriage of justice when judgment was entered for the plaintiff in the Sessions Court and on that finding, I had dismissed the appeal of the 4th defendant with costs.